RECORD
AND
BRIEFS

No. 15-214

In the Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Wisconsin Court of Appeals

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE[1]

The National Association of Counties is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The Council of State Governments is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

The National League of Cities is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U. S. Conference of Mayors, founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to amicus briefs.

people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International City/County Management Association is a nonprofit professional and educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The International Municipal Lawyers Association has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Many of amici's members are affiliated with local governments that have zoning ordinances with merger provisions like the one challenged in this case.

SUMMARY OF ARGUMENT

"Merger" provisions like the one in this case have been a common, well-accepted feature of zoning ordinances for decades, because they reconcile the community's interest in preventing the harms caused by congestion with the landowner's interest in developing a substandard lot. These provisions are so common, and have been in place for so long, that they are within the reasonable expectations of landowners and their lawyers.

A. Minimum lot size requirements are found in virtually all zoning ordinances. They serve many important purposes, including limiting traffic congestion, protecting the environment, conserving the water supply, and sustaining neighboring property values.

B. While zoning ordinances typically phase out nonconforming *uses* over an amortization period, most nonconforming *lots* are permanently exempt from minimum size requirements, because amortization will not work for nonconforming lots. Local governments have accordingly sought some other way to strike a sensible balance between private and public interests. The solution has been merger. Where the owner of an undeveloped nonconforming lot also owns another contiguous lot, and where the two lots together would be large enough to comply with the lot size minimum, ordinances often treat the two lots as one for this purpose. The lots are typically not literally merged. The sole effect of most "merger" provisions is simply that the exemption for nonconforming lots is denied to a landowner who also owns an adjacent lot.

Such merger provisions have been features of local zoning ordinances for a long time. Towns began enacting them in the 1920s. They were very common by the 1960s, because local governments and state courts recognized that they represent an appropriate middle ground between two unattractive extremes—prohibiting the development of substandard lots, which would be a hardship to their owners, and allowing the development of *all* substandard lots,

which would be a hardship to neighbors and the community.

C. Today, there are countless ordinances all over the country with merger provisions like the one challenged in this case. Several states have statutes specifically authorizing local governments to include merger provisions in their ordinances. In some states, merger is a common law doctrine that can apply even in the absence of a local ordinance requiring it. In other states, local governments enact merger provisions pursuant to general legislative grants of zoning authority.

D. The Takings Clause protects property owners against interference with their reasonable expectations. Some forms of local land use regulation, including lot size minima and the merger of nonconforming lots that often accompanies lot size minima, are so prevalent and so well-known that they could surprise no reasonable property owner. A well-advised owner or purchaser of land should expect that the land may be governed by a lot size minimum and an associated merger provision.

E. Zoning is the quintessential function performed by local governments, because every neighborhood has different characteristics and a different mix of residents. This wide variation among local communities has led to an equally wide variation in the use of merger provisions. These decisions are made by state and local elected officials who are closely responsive to community residents. Local jurisdictions constantly adjust zoning rules, including the rules governing the merger of adjacent nonconforming lots, to re-

spond to local conditions and preferences. They should be allowed to continue to do so.

ARGUMENT

"Merger" provisions like the one challenged in this case have been a common, well-accepted feature of zoning ordinances for decades.

Petitioners' argument rests on the assumption that the St. Croix County ordinance is somehow unusual or surprising in allowing the development of a substandard lot only if the lot is in separate ownership from adjacent lots. But this assumption is incorrect. Zoning ordinances all over the country include provisions just like the one in St. Croix County, and they have included such provisions for decades. These "merger" provisions are common because they serve an important purpose: They reconcile the community's interest in preventing the harms caused by congestion with the landowner's interest in developing a substandard lot. These provisions are so common, and have been in place for so long, that they are well within the reasonable expectations of landowners and their lawyers.

A. Minimum lot size requirements have long been the standard way of preventing the harms caused by congestion.

Since the advent of zoning, state and local governments have sought to regulate the density of development, in order to prevent overcrowding, to avoid depleting natural resources, to preserve the

character of communities, and to sustain property values. Minimum lot size requirements "are by far the most common form of density control in zoning ordinances." *Validity of Zoning Laws Setting Minimum Lot Size Requirements*, 1 A.L.R. 5th 622 (1992). Today, lot size requirements can be "found in virtually all zoning ordinances." 1 Douglas W. Kmiec and Katherine Kmiec Turner, *Zoning and Planning Deskbook* 109 (2015).

Courts have consistently recognized that minimum lot size requirements serve important public purposes, including

> preventing the evils of overcrowding and the ill effects of urbanization, control of traffic, protection of property values, protection of aesthetics and the character of an area, protection of open space, the provision of adequate public facilities, protection of the water supply, preventing erosion and providing emergency access, preventing water pollution, preservation of agricultural lands, and the protection of environmentally sensitive areas including wildlife habitat.

3 *Rathkopf's The Law of Zoning and Planning* § 51.12 (4th ed. Westlaw) (citations omitted).

As early as 1926, this Court noted that "[t]here is no serious difference of opinion in respect of the validity of laws and regulations fixing ... the adjoining area which must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding and the like." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). More recently, the

Court observed that minimum lot size requirements are a way of protecting a town's residents "from the ill effects of urbanization." *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980). The state courts have likewise emphasized the value of lot size restrictions in limiting traffic congestion, *Simon v. Town of Needham*, 42 N.E.2d 516, 518 (Mass. 1942), safeguarding the environment, *Gardner v. New Jersey Pinelands Comm'n*, 593 A.2d 251, 258 (N.J. 1991), conserving the water supply, *Ketchel v. Bainbridge Twp.*, 557 N.E.2d 779, 783 (Ohio 1990), and sustaining neighboring property values, *La Grange State Bank v. Village of Glen Ellyn*, 591 N.E.2d 480, 486 (Ill. App. Ct. 1992).

B. Merger has long been recognized as the most reasonable way to reconcile the landowner's interest in developing a nonconforming lot with the community's interest in preventing congestion.

A "nonconforming" lot is one that was of lawful size before the enactment of a minimum lot size requirement, but is now too small. Nonconforming *lots* are analogous to nonconforming *uses*—that is, uses of land that were once lawful but do not comply with a new zoning restriction, as when a business finds itself located within an area newly zoned for residential use. Nonconforming lots and nonconforming uses are allowed to continue, because of the obvious unfairness in forcing them to terminate immediately.

But there is one major difference between nonconforming lots and nonconforming uses. Nonconforming uses are typically phased out over time. 4

Rathkopf's The Law of Zoning and Planning § 74:18 (4th ed. Westlaw). Zoning ordinances often establish an "amortization" period, which "simply designates a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements." *Village of Valatie v. Smith*, 632 N.E.2d 1264, 1266 (N.Y. 1994). Provided the amortization period is long enough to allow the owner to recoup his investment, courts have generally concluded that amortization strikes an appropriate balance between the landowner's reasonable expectations and the public's interest in advancing the goals served by the zoning ordinance. 2 Patricia E. Salkin, *American Law of Zoning* § 12:23 (5th ed. Westlaw).

Amortization will not work for nonconforming lots, however, because the size of a lot cannot be phased out over time. Most nonconforming lots are thus grandfathered in permanently; they are forever exempt from the minimum lot size requirement that would otherwise be applicable. *Id.* § 12:12. But this outcome limits the community's ability to accomplish the goals the lot size requirement was intended to serve. Because of the impossibility of amortizing nonconforming lots, local governments have sought some other way to strike a sensible balance between private and public interests.

The solution has been merger. Where the owner of an undeveloped nonconforming lot also owns another contiguous lot, and where the two lots together would be large enough to comply with the lot size minimum, ordinances often treat the two lots as one

for this purpose. The lots are typically not literally merged. The sole effect of most "merger" provisions is simply that the exemption for nonconforming lots is denied to a landowner who also owns an adjacent lot. *See, e.g., McQuillin: The Law of Municipal Corporations* § 25:179.6 (3d ed. Westlaw) ("Municipalities often have ordinances which treat commonly owned, contiguous lots, one or more of which are nonconforming, as one conforming lot."); *Jock v. Zoning Bd. of Adjustment*, 878 A.2d 785, 794 (N.J. 2005) ("The term 'merger' is used in zoning law to describe the combination of two or more contiguous lots of substandard size, that are held in common ownership, in order to meet the requirements of a particular zoning regulation.").

Such merger provisions have been features of local zoning ordinances for a very long time. Great Neck Estates, New York, enacted one in 1926. *Ferryman v. Weisser*, 158 N.Y.S.2d 587, 588 (N.Y. App. Div. 1957). Bayville, New York, enacted one in 1927. *Flanagan v. Zoning Bd. of Appeals*, 149 N.Y.S.2d 666, 667 (N.Y. Sup. Ct. 1956), *aff'd*, 151 N.Y.S.2d 618 (N.Y. App. Div. 1956). Nahant, Massachusetts, enacted one in 1940. *Clarke v. Bd. of Appeals*, 155 N.E.2d 754, 755 & n.3 (Mass. 1959). Attleboro, Massachusetts, enacted one in 1942. *Vetter v. Zoning Bd. of Appeals*, 116 N.E.2d 277, 277-78 (Mass. 1953). Skokie, Illinois, enacted one in 1946. *Weber v. Village of Skokie*, 235 N.E.2d 406, 410 (Ill. App. Ct. 1968). Hempstead, New York, and Wellesley, Massachusetts, both enacted theirs in 1951. *Cabral v. Young*, 177 N.Y.S.2d 548, 549 (N.Y. Sup. Ct. 1958); *Sorenti v. Bd. of Appeals*, 187 N.E.2d 499, 500 & n.1

(Mass. 1963). Weston, Connecticut, enacted one in 1953. *Bankers Trust Co. v. Zoning Bd. of Appeals*, 345 A.2d 544, 546 (Conn. 1974). Berlin, Connecticut, enacted one in 1954. *Schultz v. Zoning Bd. of Appeals*, 130 A.2d 789, 790 (Conn. 1957). Redford, Michigan, enacted one sometime before 1957. *Korby v. Twp. of Redford*, 82 N.W.2d 441, 443-44 (Mich. 1957). Old Lyme, Connecticut, enacted one in 1957. *Corsino v. Grover*, 170 A.2d 267, 269 (Conn. 1961).

By 1960, merger provisions were so common that the American Society of Planning Officials included one in the Model Zoning Ordinance it published for the benefit of local governments nationwide. American Society of Planning Officials, *The Text of a Model Zoning Ordinance* 26 (2d ed. 1960). A few years later, the leading zoning treatise of the era explained that the owner of a nonconforming lot "is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception. Rather, he must combine the two lots to form one which will meet, or more closely approximate, the frontage and area requirements of the ordinance." 2 Robert M. Anderson, *American Law of Zoning* § 8.49 (1968); *see also* John R. McGill, Note, *Substandard Lots and the Exception Clause—"Checkerboarding" as a Means of Circumvention*, 16 Syracuse L. Rev. 612, 614 (1965) ("most ordinances include a section which exempts substandard lots in existence at the time the ordinance is enacted (or amended) provided they are held in single, separate ownership").

Merger provisions became common because local governments and state courts recognized that they represent an appropriate middle ground between two unattractive extremes—prohibiting the development of substandard lots, which would be a hardship to their owners, and allowing the development of *all* substandard lots, which would be a hardship to neighbors and the community. As the Maine Supreme Court explained, a merger provision "is designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property." *Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015). *See also Kalway v. City of Berkeley*, 60 Cal. Rptr. 3d 477, 483 (Cal. Ct. App. 2007) (observing that merger provisions "balance the interests of the public and private ownership").

On one side of the balance, the public has an interest in "the reduction of nonconforming lots," *Goulet v. Zoning Bd. of Appeals*, 978 A.2d 1160, 1165 (Conn. App. Ct. 2009), which exacerbate the congestion that motivated the enactment of the lot size minimum. "Otherwise, subdivisions in their infancy could perpetuate for years the problems zoning was designed to eliminate." *York Twp. Zoning Bd. of Adjustment v. Brown*, 182 A.2d 706, 707 (Pa. 1962) (citation and internal quotation marks omitted). On the other side of the balance, while any restriction on development will have some effect on the owner of property, "the financial hardship on the owner in complying is not nearly as great [where he is able] to conform by enlarging lot sizes or combining two lots

into one." *Id.* The state courts have thus widely recognized that merger provisions "operate to decrease congestion in the streets and to prevent the overcrowding of land," *Brum v. Conley*, 572 A.2d 1332, 1334 (R.I. 1990), without imposing unreasonable burdens on individual landowners.

C. For this reason, countless ordinances all over the country include merger provisions like the one challenged here.

Merger provisions are extremely common. Several states have enacted statutes specifically authorizing local governments to include merger provisions in their zoning ordinances. *See, e.g.*, Cal. Govt. Code § 66451.11 ("A local agency may, by ordinance which conforms to and implements the procedures prescribed by this article, provide for the merger of a parcel or unit with a contiguous parcel or unit held by the same owner if any one of the contiguous parcels or units held by the same owner does not conform to standards for minimum parcel size"); Mass. Gen. L. ch. 40A, § 6 (providing that lot size minimum requirements shall not apply to a nonconforming lot that "was not held in common ownership with any adjoining land"); Minn. Stat. § 394.36(5)(d) (providing that nonconforming lots "must be combined with the one or more contiguous lots so they equal one or more conforming lots as much as possible"); N.M. Stat. § 47-6-9.1 (stating power of local governments to require "consolidation of contiguous parcels in common ownership for the purpose of enforcing minimum zoning or subdivision standards on the parcels"); R.I. Gen. L. § 45-24-38 (authorizing local gov-

ernments to provide "for the merger of contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership to create dimensionally conforming lots"); Vt. Stat. tit. 24, § 4412(2)(B) (authorizing local governments to provide that "if an existing small lot subsequently comes under common ownership with one or more contiguous lots, the conforming lot shall be deemed merged with the contiguous lot").

In some states, merger is a common law doctrine that can apply even in the absence of a local ordinance requiring it. *See, e.g., Timperio v. Zoning Bd. of Appeals*, 993 N.E.2d 1211, 1215 (Mass. App. Ct. 2013) ("It is well settled that '[u]nder the common-law merger doctrine, when adjacent nonconforming lots come into common ownership, they are normally merged and treated as a single lot for zoning purposes.'") (quoting *Hoffman v. Bd. of Zoning Appeal*, 910 N.E.2d 965, 971 (Mass. App. Ct. 2009)); *Friends of the Ridge v. Baltimore Gas & Elec. Co.*, 724 A.2d 34, 38 (Md. 1999) (discussing merger); *Remes v. Montgomery Cty.*, 874 A.2d 470, 485 (Md. 2005) (referring to the discussion of merger in *Friends of the Ridge* as "a statement of the common law").

In other states, local governments enact merger provisions pursuant to general legislative grants of zoning authority. *See, e.g., Neumann v. Zoning Bd. of Appeals*, 539 A.2d 614, 616 (Conn. App. Ct. 1988) (noting that "many zoning ordinances" in the state include merger provisions, without any reference to legislation specifically authorizing them).

Today, there are countless ordinances all over the country with merger provisions like the one challenged in this case. The following list of municipalities and counties is far from complete, but it gives a sense of how common such provisions are. From Palm Springs to Providence, from Missoula to Miami, from Minneapolis to New Orleans, merger provisions are a staple of local zoning ordinances.

Alachua County, Florida. Unified Land Development Code § 408.16(a) (https://www.municode.com/library/fl/alachua_county/codes/code_of_ordinances?nodeId=PTIIIUNLADECO_TIT40LADERE_CH408NO).

Alexandria, Virginia. Zoning Ordinance § 12-401(A) (https://www.municode.com/library/va/alexandria/codes/zoning?nodeId=ARTXIINONO_12-401).

Americus, Georgia. Code of Ordinances § 94-266 (https://www.municode.com/library/ga/americus/codes/code_of_ordinances?nodeId=PTIICOOR_CH94ZO).

Amherst County, Virginia. Zoning Ordinance § 601.01(1) (https://www.municode.com/library/va/amherst_county/codes/code_of_ordinances?nodeId=COCO_APXAZOSU_ARTVIGEPR_601NOLOBUUS).

Atlantic Beach, North Carolina. Unified Development Ordinance § 17.2(B) (https://www.municode.com/library/nc/atlantic_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH18UNDEOR_ART17NOSI).

Auburn, Maine. Code of Ordinances § 60-38 (https://www.municode.com/library/me/auburn/codes/

code_of_ordinances?nodeId=PTIICOOR_CH60ZO_ARTIIGEPR).

Babylon, New York. Zoning Code § 213-231 (http://ecode360.com/6811368).

Baker, Montana. Code of Ordinances § 17.36.020(b) (https://www.municode.com/library/mt/baker/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.36NOUSLOST).

Barrington, Rhode Island. Zoning Code § 185-26(A) (http://ecode360.com/7121166). *See McKendall v. Town of Barrington*, 571 A.2d 565, 566 n.2 (R.I. 1990) (discussing an earlier version).

Bay City, Michigan. Code of Ordinances § 122-523 (https://www.municode.com/library/mi/bay_city/codes/code_of_ordinances?nodeId=PTIICOOR_CH122ZO_ARTXXIINOUS).

Becker County, Minnesota. Zoning Ordinance, ch.3, § 8(C)(1) (http://www.co.becker.mn.us/dept/planning_zoning/PDFs/ordinance/CHAPTER%203%20-%20NONCONFORMITIES.pdf); *see In re Holzgrove*, 2006 WL 920950, *1 (Minn. Ct. App. 2006).

Belvedere, California. Municipal Code § 18.34.010(A) (http://www.cityofbelvedere.org/DocumentCenter/Home/View/495).

Berkeley, California. Municipal Code § 21.52.020 (http://www.codepublishing.com/CA/Berkeley/).

Berkeley Heights, New Jersey. Municipal Land Use Procedures Ordinance § 3.1.5 (https://www.municode.com/library/nj/berkeley_heights_township/codes/code_of_ordinances?nodeId=APXAMUL

AUSPROR_PT3GERE_ART3.1APGEREAPALDI_S3.1.5ADLO).

Blacksburg, Virginia. Zoning Ordinance § 1231(a) (https://www.municode.com/library/va/blacksburg/codes/code_of_ordinances?nodeId=CO_APXAORNO1137BLZOOR_ARTIAD_DIV13NO_S1231NOLORE).

Bozeman, Montana. Unified Development Code § 38.32.030(C) (https://www.municode.com/library/mt/bozeman/codes/code_of_ordinances?nodeId=PTIICOOR_CH38UNDECO_ART32NOSI_S38.32.030NOARBUREEXLO).

Butler, Pennsylvania. Zoning Code § 300-45(A) (http://ecode360.com/9632158).

Calumet County, Wisconsin. Code of Ordinances § 82-108(a) (https://www.municode.com/library/wi/calumet_county/codes/code_of_ordinances?nodeId=COOR_CH82ZO_ARTVIIINOUSSTLO_S82-108NOLO).

Campbellsport, Wisconsin. Code of Ordinances § 35-322(b) (https://www.municode.com/library/wi/campbellsport/codes/code_of_ordinances?nodeId=PTIICOOR_CH35ZO_ARTVNOUSST).

Cary, Illinois. Code of Ordinances § 17.60.030 (https://www.municode.com/library/il/cary/codes/code_of_ordinances?nodeId=CO_TIT17ZO_CH17.60NOSI).

Cedar Rapids, Iowa. Code of Ordinances. § 32.07.050(E) (https://www.municode.com/library/ia/cedar_rapids/codes/code_of_ordinances?nodeId=CH32ZO_S32.07NO_32.07.050NOLO).

Chapel Hill, North Carolina. Land Use Management Code § 7.2.2 (https://www.municode.com/library/nc/chapel_hill/codes/code_of_ordinances?nodeId=CO_APXALAUSMA_ART7NO).

Charlotte, North Carolina. Zoning Code § 7.105(2) (https://www.municode.com/library/nc/charlotte/codes/code_of_ordinances?nodeId=PTIICOOR_APXAZO_CH7NO_S7.105NOVALO).

Cherry Hill, New Jersey. Zoning Regulations, art. IV, § 401(D)(1) (http://www.cherryhill-nj.com/DocumentCenter/View/927).

Cherry Hills Village, Colorado. Municipal Code § 16-2-70(a)(1) (https://www.municode.com/library/co/cherry_hills_village/codes/municipal_code?nodeId=CH16ZO_ARTIIADEN_S16-2-70MENOLORE).

Chesapeake, Virginia. Zoning Ordinance § 15-109(E)(1) (http://www.cityofchesapeake.net/Assets/documents/departments/planning/ord-ta-z-05-17-nonconforming_lots-022206.pdf).

Cheshire, Connecticut. Zoning Regulations § 24.8 (http://www.cheshirect.org/media/12656/zoning%20regs%20ii%20-%20june%202011.pdf); *see Goulet v. Zoning Bd. of Appeals*, 978 A.2d 1160, 1162-63 (Conn. App. Ct. 2009).

Clark County, Nevada. Unified Development Code § 30.76.030(c) (http://www.clarkcountynv.gov/comprehensive-planning/zoning/Documents/3076.pdf).

Clovis, New Mexico. Code of Ordinances § 17.80.212(A) (https://www.municode.com/library/

nm/clovis/codes/code_of_ordinances?nodeId=TIT17COZORE_CH17.80NO).

Costa Mesa, California. Code of Ordinances § 13-207(b) (https://www.municode.com/library/ca/costa_mesa/codes/code_of_ordinances?nodeId=TIT13PLZODE_CHXNOUSDELO_S13-207NOLO).

Coventry, Connecticut. Zoning Regulations § 4.02.03 (http://www.coventryct.org/DocumentCenter/View/154).

Crow Wing County, Minnesota. Land Use Ordinance § 5.3(B) (http://crowwing.us/DocumentCenter/View/5397).

DeKalb County, Georgia. Zoning Ordinance § 8.1.4(B) (http://planningdekalb.net/wp-content/uploads/2015/08/completzoningplanoptimized.pdf).

East Greenwich, New Jersey. Code of Ordinances § 16.55.110 (https://www.municode.com/library/nj/east_greenwich_township/codes/code_of_ordinances?nodeId=TIT16LADECO_CH16.55PEST_16.55.110COLO).

East Providence, Rhode Island. Ordinances § 19-133 (http://clerkshq.com/default.ashx?clientsite=eastprovidence-ri); *see Brum v. Conley*, 572 A.2d 1332, 1334 (R.I. 1990).

Edmond, Oklahoma. Code of Ordinances § 22.7.9(C) (https://www.municode.com/library/ok/edmond/codes/code_of_ordinances?nodeId=COOR_TIT22ZOOR_CH7NOSI_22.7.9NOLO).

El Paso, Texas. Code of Ordinances § 20.22.020 (https://www.municode.com/library/tx/el_paso/codes/c

ode_of_ordinances?nodeId=TIT20ZO_CH20.22NOSI).

Elk Grove, California. Municipal Code § 22.16.020 (http://www.codepublishing.com/CA/ElkGrove/html/ElkGrove22/ElkGrove2216.html#22.16.020).

Elmira, New York. Zoning Ordinance § 910 (https://www.municode.com/library/ny/elmira/codes/code_of_ordinances?nodeId=PTIICOOR_APXBZO_ARTIXNOUS_S910NOLORE).

Exeter, Rhode Island. Zoning Ordinance § 3.5.2 (https://www.municode.com/library/ri/exeter/codes/code_of_ordinances?nodeId=APXAZO_ARTIIICONOLOUS).

Fargo, North Dakota. Code of Ordinances § 20-1003(c) (https://www.municode.com/library/nd/fargo/codes/code_of_ordinances?nodeId=CH20LADECO_ART20-10NO_S20-1003NOLO).

Fenwick, Connecticut. Zoning Regulations § 8.3 (http://www.boroughoffenwick.com/sites/fenwickct/files/file/file/2011_borough_of_fenwick_zoning_regulations_amended_through_6.1.14.pdf); *see Bank of America v. Zoning Bd. of Appeals*, 2008 WL 4378824, *2 (Conn. Super. Ct. 2008).

Flemington, Georgia. Zoning Ordinance § 3.25.1 (https://www.municode.com/library/ga/flemington/codes/code_of_ordinances?nodeId=PTIICOOR_APXAZO_ARTIIIGEPR_S3.25NOLO).

Fort Lauderdale, Florida. Unified Land Development Code § 47-3.3(B)(3) (https://www.municode.com/library/fl/fort_lauderdale/codes/unified_land_develo

pment_code?nodeId=UNLADERE_CH47UNLADERE_ARTIGERE_S47-3NOUSSTLO).

Frederick, Maryland. Land Management Code § 901(a)(1)(E) (https://www.municode.com/library/md/frederick/codes/land_management_code?nodeId=ART9NOUSVERISCAP).

Greensboro, North Carolina. Land Development Ordinance § 30-2-2.2(A) (http://www.greensboro-nc.gov/modules/showdocument.aspx?documentid=27027).

Greenwich, Connecticut. Municipal Code § 6-9 (http://www.greenwichct.org/upload/medialibrary/52f/PZ-Regs-Div-2.pdf).

Grosse Ile, Michigan. Zoning Code § 285-18.5(D) (http://ecode360.com/8143232).

Guilford County, North Carolina. Land Development Ordinances § 3-14.1(B)(1) (https://www.municode.com/library/nc/guilford_county/codes/development_ordinances?nodeId=LAND_DEVELOPMENT_ORD_ARTIIIPEPR_3-14NOLOUSST_3-14.1NOLORE).

Haddonfield, New Jersey. Land Development Ordinance § 304(E) (http://www.haddonfieldnj.org/LDO/LDO300.shtml).

Hanover County, Virginia. Code of Ordinances § 26-9(c)(1) (https://www.municode.com/library/va/hanover_county/codes/code_of_ordinances?nodeId=COCO_CH26ZOOR_ART1GEPR_DIV3NO_S26-9NOLO).

Henry County, Georgia. Unified Land Development Code § 11.01.02(A)(2) (https://www.municode.com/library/ga/henry_county/codes/code_of_ordinances?nodeId=PTIIICOOR_APXAUNLADECO_CH11VA).

High Point, North Carolina. Code of Ordinances § 9-4-17(a)(1)(a) (https://www.municode.com/library/nc/high_point/codes/code_of_ordinances?nodeId=TIT9DE_CH4ZO_ARTCZOLONO).

Highland Park, Illinois. Zoning Code § 150.710(A) (http://www.cityhpil.com/DocumentCenter/View/5754); *see LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 786 (Ill. App. Ct. 2003) (discussing an earlier version).

Hillsborough County, Florida. Land Development Code § 11.03.03(C) (https://www.municode.com/library/fl/hillsborough_county/codes/land_development_code?nodeId=ARTXIINEXEQREEN_PT11.03.00NO_S11.03.03NOLO).

Hinckley, Illinois. Zoning Ordinance art. 7(A)(1)(b) (https://www.municode.com/library/il/hinckley/codes/code_of_ordinances?nodeId=MUCO_APXAZO_ART7NO).

Holladay, Utah. City Code § 13.76.050(A) (http://www.sterlingcodifiers.com/codebook/index.php?book_id=559).

Huntsville, Alabama. Zoning Ordinance § 74.1.2 (http://www.huntsvilleal.gov/Planning/ZonOrd/ZonOrd.pdf).

Islip, New York. Code § 68-15(G) (http://ecode360.com/7703429).

Jamestown, Rhode Island. Code of Ordinances § 82-709 (https://www.municode.com/library/ri/jamestown/codes/code_of_ordinances?nodeId=PTIICOOR_CH82ZO_ART7NOUS_S82-709MECONOLORE).

Juneau, Wisconsin. Code of Ordinances § 17.20.030(C) (https://www.municode.com/library/wi/juneau/codes/code_of_ordinances?nodeId=TIT17ZO_CH17.20NOUSLOST_17.20.030EXNOLO).

Jupiter Island, Florida. Land Development Regulations, art. IX, § 1.00(B) (https://www.municode.com/library/fl/jupiter_island/codes/code_of_ordinances?nodeId=PTIICOOR_APXALADERE_ARTIXNO).

Kewaskum, Wisconsin. Municipal Code § 95-115(c) (https://www.municode.com/library/wi/kewaskum/codes/code_of_ordinances?nodeId=PTIIMUCO_CH95ZO_ARTVIINOUSSTLO_S95-115EXNOLO).

King William County, Virginia. Code of Ordinances § 86-61(1) (https://www.municode.com/library/va/king_william_county/codes/code_of_ordinances?nodeId=COOR_CH86ZO_ARTIIGECOAPTHCOJU_S86-61NOLORE).

La Cañada Flintridge, California. Municipal Code § 11.63.010 (http://qcode.us/codes/lacanadaflintridge).

Lafayette, Colorado. Code of Ordinances § 26-26-5(b) (https://www.municode.com/library/co/lafayette/codes/code_of_ordinances?nodeId=COOR_CH26DEZO_S26-26NOUS_S26-26-5NOLO).

Lancaster County, South Carolina. Unified Development Ordinance § 9.4(1) (https://www.municode.com/library/sc/lancaster_county/codes/code_of_ordinances?nodeId=PTITHCO_APXBUNDEOR_CH9NOSI).

Laramie, Wyoming. Municipal Code § 15.22.010 (https://www.municode.com/library/wy/laramie/codes/code_of_ordinances?nodeId=TIT15UNDECO_CH15.22NO_15.22.010NOLO).

Lee County, North Carolina. Unified Development Ordinance § 12.3.3 (https://www.municode.com/library/nc/lee_county/codes/code_of_ordinances?nodeId=COOR_APXAUNDEOR_ART12NOVERI).

Liberty County, Georgia. Zoning Ordinance § 3.24.1 (https://www.municode.com/library/ga/liberty_county_/codes/code_of_ordinances?nodeId=COOR_APXAZO_ARTIIIGEPR_3.24NOLO).

Lincoln, Nebraska. Municipal Code § 27.72.010(c)(4) (http://lincoln.ne.gov/city/attorn/lmc/ti27/ch2772.pdf).

Madeira Beach, Florida. Code of Ordinances § 110-417 (https://www.municode.com/library/fl/madeira_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH110ZO_ARTVISUDIRE_DIV2LOYAHEOTSIARRE_S110-416NOLOREXILORE).

Madison Heights, Michigan. Zoning Ordinance § 10.503(3)(A) (http://www.madison-heights.org/departments/community_development/docs/MHZoninOrd10_12_10.pdf).

Manhattan Beach, California. Municipal Code § 11.32.030(A) (https://www.municode.com/library/ca/manhattan_beach/codes/code_of_ordinances?nodeId=TIT11SU_CH11.32REACME_11.32.030MECOPAON).

Martinsville, Virginia. Zoning Ordinance § VI-B. (https://www.municode.com/library/va/martinsville/codes/code_of_ordinances?nodeId=CO_APXBZOOR_SVINO_BNOLORECOFRONOW).

Mendocino County, California. Ordinances § 17-106 (http://www.co.mendocino.ca.us/planning/pdf/ARTICLE_XV.pdf).

Miami, Florida. Zoning Code § 7.2.7(c)(1)(a) (http://www.miami21.org/PDFs/May2015-VolumeI.pdf).

Minneapolis, Minnesota. Code of Ordinances § 531.100(b) (https://www.municode.com/library/mn/minneapolis/codes/code_of_ordinances?nodeId=MICOOR_TIT20ZOCO_CH531NOUSST).

Missoula, Montana. Zoning Ordinance § 20.80.020(B)(3) (http://www.ci.missoula.mt.us/DocumentCenter/View/30846).

Mount Pleasant, New York. Town Code § 218-79(A) (http://ecode360.com/9608721); *see Van Perlstein v. Oakley*, 611 N.Y.S.2d 336, 337 (N.Y. App. Div. 1994) (discussing a previous version).

Muskegon, Michigan. Zoning Ordinance § 2305 (https://www.muskegon-mi.gov/documents/pdf/1017.pdf).

Nashotah, Wisconsin. Code of Ordinances § 17.78 (https://www.municode.com/library/wi/nashotah/codes/code_of_ordinances?nodeId=CH17ZOCO_NOUSSTLO).

Nashville, North Carolina. Code of Ordinances § 18-187(b) (https://www.municode.com/library/nc/nashville/codes/code_of_ordinances?nodeId=PTII COOR_CH18LAUSRE_ARTIIZO_DIV7NOUS_S18-187NOLO).

New Bedford, Massachusetts. Code of Ordinances § 2712 (https://www.municode.com/library/ma/new_bedford/codes/code_of_ordinances?nodeId=COOR_CH9COZO_S2000USDIRE_2700DIRE).

New Orleans, Louisiana. Comprehensive Zoning Ordinance § 25.5(A)(2) (http://czo.nola.gov/article-25/).

Newport News, Virginia. Code of Ordinances § 45-507(1) (https://www.municode.com/library/va/newport_news/codes/code_of_ordinances?nodeId=COOR_CH45ZOOR_ARTVGERE_S45-507NOLORE).

Newton, Massachusetts. Zoning Ordinance § 7.8.1(C) (http://www.newtonma.gov/civicax/filebank/documents/69436); *see Mauri v. Zoning Bd. of Appeals*, 983 N.E.2d 742, 745 n.4 (Mass. App. Ct. 2013) (discussing an earlier version).

North Providence, Rhode Island. Zoning Ordinance § 413 (http://northprovidenceri.gov/pdf/plan/North_Providence_Zoning_Ordinance.pdf); *see Maron v. North Providence Zoning Bd. of Review*, 2006 WL 951374, *4 (R.I. Super. Ct. 2006) (discussing an earlier version enacted in 1959).

Norway, Michigan. Zoning Ordinance § 708 (https://www.municode.com/library/mi/norway/codes/code_of_ordinances?nodeId=PTIICOOR_APXCZOOR_ARTVIINOUSSTLO_S708NOLO).

Norwell, Massachusetts. Zoning Bylaws § 1650(a)(2) (http://www.townofnorwell.net/sites/norwellma/files/uploads/zoning_bylaw_including_may_2015_amendments.pdf); *see Planning Bd. v. Serena*, 550 N.E.2d 1390, 1390-91 (Mass. 1990) (discussing an earlier version).

Okeechobee, Florida. Code of Ordinances § 90-32 (https://www.municode.com/library/fl/okeechobee/codes/code_of_ordinances?nodeId=PTIICOOR_CH90ZO_ARTIINO_S90-32DENOLO).

Old Orchard Beach, Maine. Code of Ordinances § 78-145(b) (https://www.municode.com/library/me/old_orchard_beach/codes/code_of_ordinances?nodeId=PTIICOOR_CH78ZO_ARTIIICONO_DIV1GE_S78-145MELO).

Orange, California. Municipal Code § 16.04.070 (https://www.municode.com/library/ca/orange/codes/code_of_ordinances?nodeId=TIT16SU_CH16.04GEPR).

Ormond Beach, Florida. Land Development Code § 2-61(B) (http://www.ormondbeach.org/DocumentCenter/Home/View/241).

Outagamie County, Wisconsin. Code of Ordinances § 54-44(b) (https://www.municode.com/library/wi/outagamie_county/codes/code_of_ordinances?nodeId=COOR_CH54ZO_ARTIINO_S54-44NOLORE).

Oyster Bay, New York. Zoning Code § 246-4.3.4.3 (http://ecode360.com/26884581); *see Faranda v. Schoepflin*, 250 N.Y.S.2d 928, 929 (N.Y. App. Div. 1964) (discussing an earlier version enacted before 1963).

Palm Springs, California. Municipal Code § 94.05.02(C) (http://www.qcode.us/codes/palmsprings).

Palmdale, California. Municipal Code § 16.130.020(A)(2) (http://www.codepublishing.com/CA/Palmdale/?Palmdale16/Palmdale1610.html&?f).

Phippsburg, Maine. Land Use Ordinance § 11(B)(2); *see Day v. Town of Phippsburg*, 110 A.3d 645, 647 (Me. 2015).

Pittsburgh, Pennsylvania. Zoning Code § 921.04.A (https://www.municode.com/library/pa/pittsburgh/codes/code_of_ordinances?nodeId=PIZOCO_TITNINEZOCO_ARTVIINO_CH921NO_921.04NOLO).

Plainville, Massachusetts. Zoning Bylaws § 500-16(E)(2)(a) (http://ecode360.com/11815024); *see Giovannucci v. Bd. of Appeals*, 344 N.E.2d 913, 914 n.2 (Mass. App. Ct. 1976) (discussing an earlier version enacted in 1965).

Polk Township, Pennsylvania. Zoning Ordinance § 5.9(c)(2) (http://elibrary.pacounties.org/Documents/Monroe_County/1354;%20Polk%20Township/4208961928mzo.pdf); *see Cottone v. Zoning Hearing Bd.*, 954 A.2d 1271, 1277-78 (Pa. Commw. Ct. 2008).

Providence, Rhode Island. Code of Ordinances § 27-2003(E) (https://www.municode.com/library/ri/

providence/codes/code_of_ordinances?nodeId=PTII COOR_CH27ZO_ART20NO_2003NOLO).

Queen Anne's County, Maryland. Zoning and Subdivision Regulations § 18:1-19(G)(3) (http://ecode360.com/7137775); *see Quinn v. Bd. of Cty. Comm'rs*, 124 F. Supp. 3d 586, 591 (D. Md. 2015).

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Rancho Palos Verdes, California. Municipal Code § 17.84.040(A) (https://www.municode.com/library/ca/rancho_palos_verdes/codes/code_of_ordinances?nodeId=TIT17ZO_ARTVIIIAD_CH17.84NO_17.84.040NOLO).

Randolph Township, New Jersey. Land Development Code § 15-11.4 (https://www.municode.com/library/nj/randolph_township/codes/land_development_code?nodeId=LAND_DEVELOPMENT_CODE_ARTIIIZO_15-11GEPR).

Richmond, Michigan. Zoning Ordinance § 22.03(B)(2) (https://www.municode.com/library/mi/richmond/codes/code_of_ordinances?nodeId=PTII COOR_APXAZOOR_ART22NO).

Rutland, Vermont. Zoning Regulations § 510(C) (http://www.rutlandtown.com/various/zoning-5512.pdf).

Saco, Maine. Zoning Ordinance § 502-1 (http://www.sacomaine.org/departments/codes/zoning

5.pdf); *see LaPointe v. City of Saco*, 419 A.2d 1013, 1014 (Me. 1980) (discussing an earlier version enacted in 1968).

St. Paul, Minnesota. Zoning Code § 62.103 (https://www.municode.com/library/mn/st._paul/codes/code_of_ordinances?nodeId=PTIILECO_TITVIIIZOCO_CH62ZOCOONLOUSST).

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San Luis Obispo, California. Zoning Regulations § 17.12.020(A) (http://www.slocity.org/home/showdocument?id=5861).

Sanger, California. Code of Ordinances § 90-929(b) (https://www.municode.com/library/ca/sanger/codes/code_of_ordinances?nodeId=CICO_CH90ZO_ARTXXIIIGECOAPZODI_DIV3NOBUSTUS).

Sanibel, Florida. Code of Ordinances § 126-191 (https://www.municode.com/library/fl/sanibel/codes/code_of_ordinances?nodeId=SPBLADECO_CH126ZO_ARTVNO_DIV4LO_S126-191COCONOLO).

Sarasota, Florida. Zoning Code § V-108(b) (https://www.municode.com/library/fl/sarasota/codes/zoning?nodeId=ARTVVERINNF).

Scranton, Pennsylvania. Zoning Code § 445-77(C)(2)(c) (http://ecode360.com/11611599).

Shelter Island, New York. Zoning Code § 133-22(A) (http://ecode360.com/7732492).

South Kingstown, Rhode Island. Zoning Ordinance § 206 (https://www.municode.com/library/ri/south_kingstown/codes/code_of_ordinances?nodeId=PTIIICOOR_APXAZOOR_ART2NO_S206ABNOLOREUNSAOW); *see Skelley v. Zoning Bd. of Review*, 569 A.2d 1054, 1055 (R.I. 1990) (discussing an earlier version).

Spring Valley, New York. Zoning Code § 255-52(C) (http://ecode360.com/9396341).

Stonington, Connecticut. Zoning Regulations § 2.8 (http://www.stonington-ct.gov/sites/stoningtonct/files/file/file/zr_e25_7_1_15_0.pdf); *see Neumann v. Zoning Bd. of Appeals*, 539 A.2d 614, 615-16 (Conn. App. Ct. 1988) (discussing an earlier version).

Stratford, New Jersey. Code of Ordinances § 17.52.400 (https://www.municode.com/library/nj/stratford_borough/codes/code_of_ordinances?nodeId=T17_C17.52_17.52.400).

Tampa, Florida. Code of Ordinances § 27-295(b)(1) (https://www.municode.com/library/fl/tampa/codes/code_of_ordinances?nodeId=COOR_CH27ZOLADE_ARTVIINO).

Thomasville, North Carolina. Zoning Ordinance, art. VIII, § 2(2) (https://www.municode.com/library/nc/thomasville/codes/code_of_ordinances?nodeId=PTIICOOR_APXAZO_ARTVIIINOSI).

Wall Township, New Jersey. Land Use and Development Regulations § 140-131 (http://ecode360.com/9589206); *see Jock v. Zoning Bd. of Adjustment*, 878 A.2d 785, 794-96 (N.J. 2005).

Warren, Rhode Island. Code of Ordinances § 32-82 (https://www.municode.com/library/ri/warren/codes/zoning_ordinance?nodeId=CH32ZO_ARTXIVSULOLORE_S32-82MELOUNSAOW).

Wiggins, Mississippi. Land Development Code § 7.2 (https://www.municode.com/library/ms/wiggins/codes/code_of_ordinances?nodeId=COOR_APXALADECO_ART7NOLONOSTNOUSLAST).

Wilton, Maine. Zoning Ordinance § 2.3(E)(2)(a) (http://www.wiltonmaine.org/download/ordinaces/2014zo.pdf).

Winston-Salem, North Carolina. Unified Development Ordinance § 5-3.2(A)(1) (https://www.municode.com/library/nc/winston-salem/codes/-fs-_forsyth_county_unified_development_ordinance_(udo)?nodeId=CHBZOOR_ARTVNOSI_5-3NOVALO).

York, Maine. Zoning Ordinance § 17.3.1(B)(1) (http://www.yorkmaine.org/LinkClick.aspx?fileticket=LmrM2fQ4j08%3d&tabid=181&mid=1633); *see Robertson v. Town of York*, 553 A.2d 1259, 1259-60 (Me. 1989) (discussing an earlier version).

York Township, Pennsylvania. Zoning Ordinance § 265-903 (http://www.yorktownship.com/wp-content/uploads/website-Zoning-Ordinance-amended-10-28-13.pdf); *see York Twp. Zoning Bd. of Adjustment v. Brown*, 182 A.2d 706, 706-07 (Pa. 1962) (discussing an earlier version enacted before 1962).

Ypsilanti, Michigan. Code of Ordinances § 122-203(4) (https://www.municode.com/library/mi/ypsilanti/codes/code_of_ordinances?nodeId=PTIICOOR_CH122ZO_ARTVINOUSBUSTLO).

D. These merger provisions are so common, and have been in place for so long, that they are within the reasonable expectations of landowners and their lawyers.

The Takings Clause protects property owners against interference with their reasonable expectations. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). Some forms of local land use regulation, including lot size minima and the merger of nonconforming lots that often accompanies lot size minima, are so prevalent and so well-known that they could surprise no reasonable property owner. These rules have been common for more than half a century. They are familiar parts of the landscape. Competent lawyers know them and advise their clients accordingly.

Indeed, with just a few minutes of research, one can find many periodicals and web pages explaining that the purchaser of a vacant nonconforming lot should be careful to ascertain whether the lot is governed by a merger provision. *See, e.g.*, Kathleen Deegan Dickson, *The Law of Merger*, N.Y. Real Estate J., Nov. 11, 2014 ("Take caution when purchasing a vacant parcel of land [because of] the possibility of the merger of lots.") (http://nyrej.com/78995); Anthony S. Guardino, *Lot Merger and Single and Separate Exemptions*, N.Y. Law J. Long Island Weekly, Dec. 11, 2004 ("lot merger frequently play[s] a crucial role in the zoning approval process") (http://www.farrellfritz.com/wp-content/uploads/art-183.pdf); Anne L.H. Studholme, *Understanding "Merger" of*

Nonconforming Lots, http://www.hillwallack.com/?t=40&an=15702 ("Those thinking of buying a parcel composed of undersized lots need to understand the doctrine of merger."); Lloyd Pilchen, *When Two Become One: A Look at the Law of Merger of Adjoining Parcels*, American Surveyor, vol. 7, issue 4 (2010) ("Local governments typically only seek to impose a merger when [the adjoining lot] does not conform to today's zoning standards, such as minimum lot area or street frontage.") (http://www.amerisurv.com/content/view/7419); Richard Gallogly, *Merger by Acquisition: Grandfathered Status Can Be Lost*, Mass. Land Use Monitor, Aug. 22, 2013 ("the grandfathered status of a lawful pre-existing nonconforming lot is not perpetual, and can be lost if the lot later comes into common ownership with adjoining land") (http://www.massachusettslandusemonitor.com/zoning/the-status-of-a-pre-existing-nonconforming-lot-is-subject-to-change/).

Practice guides for attorneys likewise advise that local zoning ordinances may treat a nonconforming lot as merged with an adjoining lot in common ownership. *See, e.g.*, 28 Arthur L. Eno, Jr., et al., *Massachusetts Practice: Real Estate Law* § 23.6 (4th ed. Westlaw) ("Always check the local zoning bylaw or ordinance .... [B]uilding lots which do not meet current zoning dimensional requirements, and which came into common ownership or control subsequent to the zoning change that rendered them nonconforming, are merged into a single lot for zoning purposes."); 9B Robert A. Fuller, *Connecticut Practice: Land Use Law & Practice* § 53:6 (4th ed. Westlaw) ("there can be lot merger ... where the zoning regula-

tions contain a merger provision for nonconforming contiguous lots"); 36 David J. Frizell and Ronald D. Cucchiaro, *New Jersey Practice: Land Use Law* § 15.7 (3d ed. Westlaw) (suggesting that merger can be easily avoided by titling adjacent nonconforming parcels in different entities, because "[s]o long as the legal titles are kept separate, the doctrine will not be used to merge lots that are under a single 'dominion and control.'"); H. Bernard Waugh, Jr., *"Grandfathered"—The Law of Nonconforming Uses and Vested Rights*, N.H. Bar. J., March 1990, 17, 30 ("The substandard lot problem ... deals with whether the USE of a subdivision lot is 'grandfathered.' The 'merger' problem, on the other hand, deals with whether the SEPARATION of that lot from adjoining property in common ownership, is 'grandfathered.'").

In short, a well-advised owner or purchaser of land should expect that the land may be governed by a lot size minimum and an associated merger provision. These are common zoning rules that are well within the reasonable expectations of landowners and their lawyers.

E. State and local governments should have leeway to respond to local conditions.

"[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975). Every neighborhood has different physical characteristics and a different mix of residents, so what works for one place will not work for another. Zoning is thus "the quintessentially local activi-

ty." *Evans v. United States*, 504 U.S. 255, 295 (1992) (Thomas, J., dissenting). "It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

This wide variation among local communities has led to an equally wide variation in the use of merger provisions. Many towns have them. Many others do not. Some local jurisdictions apply merger to all contiguous commonly-owned nonconforming parcels. Other jurisdictions apply merger to such parcels only if certain conditions are met. These decisions are made by local elected officials who are closely responsive to community residents. If the residents of a town want a merger provision, they can enact one, and if they want to repeal a merger provision, they can repeal one. This kind of choice is the bread and butter of local government. It has never been thought to require the imposition of a nationally uniform rule.

State governments are likewise responsive to the views of state residents. In New Hampshire, for example, after the state supreme court held that towns had the authority to merge nonconforming contiguous lots, *Sutton v. Town of Guilford*, 992 A.2d 709, 718-19 (N.H. 2010), the state legislature enacted statutes requiring the owner's consent before lots could be merged and allowing merged lots to be restored to their premerger status at the request of the owner. N.H. Stat. §§ 674:39-a, 674:39-aa(II). In Ver-

mont, until 2003, state law required towns with zoning ordinances to merge adjacent nonconforming lots. *See* former Vt. Stat. tit. 24, § 4406(1)(A) (repealed 2003). The legislature replaced this requirement with a statute allowing towns to make this decision for themselves. Vt. Stat. tit. 24, § 4412(2)(B). A similar change in the law took place in California between 1977 and 1983, when the legislature replaced a statute requiring merger with one authorizing local governments to adopt merger provisions if they choose. *See Morehart v. Cty. of Santa Barbara*, 872 P.2d 143, 162 (Cal. 1994).

As these examples suggest, state and local governments are constantly adjusting zoning rules, including the rules governing the merger of adjacent nonconforming lots, to respond to local conditions and local preferences. They should be allowed to continue to do so.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted,

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